

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIGUEL E. DIAZ, ) No. C 06-03162 JF (PR)  
Petitioner, ) ORDER REOPENING HABEAS  
v. ) ACTION; TO SHOW CAUSE  
TOM CAREY, Warden, )  
Respondent )  
\_\_\_\_\_  
)

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 24, 2008, the Court granted Petitioner's application to stay the petition pending Petitioner returning to this Court after exhausting his state remedies for additional claims pursuant to Rhines v. Webber, 544 U.S. 269, 277-78 (2005). (See Docket No. 7.)

On September 13, 2008, within thirty days of the state high court's decision denying relief on August 27, 2008, Petitioner filed an amended petition. (Docket No. 12.) Petitioner has established that the unexhausted claims are now exhausted. (See id.) The Court construes the filing of the amended petition as a motion to reopen the action. Accordingly, the Court orders the action reopened, and the stay lifted.

The following claims are cognizable, when liberally construed: (1) ineffective assistance of trial counsel; (2) juror misconduct; (3) ineffective assistance of appellate counsel; (4) improper jury instructions; (5) abuse of discretion by the trial court in sentencing; (6) prosecutorial misconduct; (7) “Cunningham/Apprendi error” in sentencing; (8) actual innocence; and (9) cumulative error. The Court orders Respondent to show cause why the petition should not be granted.

## CONCLUSION

1. The clerk shall REOPEN the case.

2. The Clerk shall serve by mail a copy of this order and the amended petition (Docket No. 12) and all attachments thereto upon Respondent and Respondent's attorney, the Attorney General of the State of California. The Clerk shall also serve a copy of this order on the Petitioner.

3. Respondent shall file with the Court and serve on Petitioner, within **sixty (60) days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted. Respondent shall file with the answer and serve on Petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

If Petitioner wishes to respond to the answer, he shall do so by filing a traverse with the Court and serving a copy on Respondent within **thirty (30) days** of his receipt of the answer.

4. Respondent may file a motion to dismiss on procedural grounds in lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If Respondent files such a motion, Petitioner shall file with the court and serve on Respondent an opposition or statement of non-opposition within **thirty (30) days** of receipt of the motion, and Respondent shall file with the Court and serve on Petitioner a reply within **fifteen (15) days** of receipt of any opposition.

1       5. It is Petitioner's responsibility to prosecute this case. Petitioner must keep  
2 the Court and all parties informed of any change of address by filing a separate paper  
3 captioned "Notice of Change of Address." Petitioner must comply with the Court's  
4 orders in a timely fashion. Failure to do so may result in the dismissal of this action for  
5 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

6       IT IS SO ORDERED.

7       DATED: 6/29/09



JEREMY FOGEL  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL E DIAZ,  
Petitioner,  
v.  
TOM CAREY, Warden,  
Respondent.

Case Number: CV06-03162 JF

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 7/9/09, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Miguel E. Diaz T-83077  
CA State Prison  
2100 Beabody Road  
6-102 Lower  
Vacaville, CA 95687

Dated: 7/9/09

Richard W. Wiking, Clerk